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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 675

SHERMAN B. HOGAN, CENTRAL TRUCK LINES, INC., and FIREMAN'S FUND INDEMNITY COMPANY,
Petitioners,

Versus

ANNA LAURA WILLIAMS and CARRIE JACKSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

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No. .....

SHERMAN B. HOGAN, CENTRAL TRUCK LINES, INC., and FIREMAN'S FUND INDEMNITY COMPANY,

Petitioners,

versus

ANNA LAURA WILLIAMS and CARRIE JACKSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Sherman B. Hogan, Central Truck Lines, Inc., and Fireman's Fund Indemnity Company petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in these cases on December 7, 1951.

I.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code [28 U. S. C. A. 1254(1)]. The judgment of the Court of Appeals was entered December 7, 1951. Petition for rehearing was denied January 9, 1952.

II.

Preliminary Statement.

Respondents, Anna Laura Williams and Carrie Jackson, brought separate actions against petitioners, each seeking damages for the death of a daughter killed in a collision between a school bus, in which the deceased daughters were riding, and a truck driven by petitioner Hogan, owned by Petitioner Central Truck Lines, and insured against negligence by petitioner Fireman's Fund Indemnity Company. The two cases, involving the same accident, were consolidated for trial in the District Court, and appeals were consolidated and heard by the United States Court of Appeals for the Fifth Circuit on one record, and one decision rendered by the Court of Appeals. One question presented and decided by the Court of Appeals is involved only in the case of Anna Laura Williams, and that question is also presented here. The other question presented here is common to both cases. Hence, it is thought that one petition and one record will serve the purpose and save the time and energy of this Court.

III.

Questions Presented.

A.

Question involved only in Anna Laura Williams case.

1. Whether the United States Court of Appeals has decided an important question of local law in a way probably in conflict with a statute of the State of Georgia, and applicable decisions of the Supreme Court of Georgia (Georgia Code 105-1307) providing that a mother, or, if no mother, a father, may recover for the homicide of a child upon whom she or he is dependent and who contributes to her or his support, which statute has been construed by the highest court in Georgia, to-wit: the Supreme Court of Georgia, to mean that the condition of dependence contemplated by such section is that of the parent with relation to his or her personal need of aid in obtaining a livelihood and that a parent whose earnings are enough to more than afford her or him individually a support commensurate with her or his circumstances and standing in life is not, under the provisions of this section, entitled to recover for the homicide of a child whose contributions to the parent assisted the plaintiff parent in taking care of others whose support the parent had voluntarily undertaken or with which the parent was legally chargeable; and where, as in this case, the undisputed evidence showed that the mother for nearly six years prior to the death of her daughter lived in New York City and her daughter lived in Georgia with plaintiff's mother, the child's grandmother, and the plaintiff (mother) had individual earnings not only sufficient for her own support but also for the support of her mother and daughter in Georgia, and where the daugh-

ter contributed no money to the support of her mother, and the services of the daughter were largely rendered to the grandmother, and where the plaintiff (mother) testified positively that she did not receive any support from her daughter or any part of it and that the daughter did not render any service to her for her own support, and that the services of the daughter were services she rendered to her grandmother, and where the United States Court of Appeals decided that notwithstanding the construction placed upon said statute by the Supreme Court of Georgia, as aforesaid, the question of the mother's right to bring the action was one for a jury to decide.

2. Whether the United States Court of Appeals has erroneously construed a Georgia statute, and the applicable decisions of the Supreme Court of Georgia, when it decided that although a mother was not in any way dependent upon a child for monetary support, the mother having ample financial means of support, the mother might still be held to be dependent upon the child in the form of services, which would be considered as rendered for support.

3. Whether the United States Court of Appeals is required to apply the State law, in a case in which such law is controlling, to the effect that the testimony of a party who offers himself as a witness in his own behalf is to be construed most strongly against him.

B.

Question presented which is common to both cases.

1. Whether, in cases brought against the driver of a motor truck against the owner of that truck and against an insurance company carrying liability insurance on the truck, for damages growing out of the alleged negligence

of the driver of the truck (it being permissible under a Georgia statute to join the insurance carrier as a party to such suit), the trial judge at the special written request of defendants, now petitioners, should have admonished the jury that they should not consider the fact that the defendant insurance company issued a policy of liability insurance to protect the owner of the truck in determining whether or not the driver was negligent and liable to the plaintiffs, where the liability of the driver, of the owner, and of the insurance company was solely dependent upon the finding of negligence against the driver.

IV.

Statement of Matter Involved.

A.

Statement of matter involved relating to Anna Laura Williams case.

Anna Laura Williams, Respondent, brought action against petitioners for the homicide of her minor daughter based on Georgia Code, Section 105-1307, which reads:

> "A mother, or, if no mother, a father, may recover for the homicide of a child, minor or *sui juris*, upon whom she or he is dependent, or who contributes to her or his support, unless said child shall leave a wife, husband, or child. The mother or father shall be entitled to recover the full value of the life of such child."

The only question involved here is whether, under the undisputed evidence, Anna Laura Williams brought herself within the provisions of the above statute of Georgia (Code 105-1307) as construed by the Supreme Court of Georgia, the highest court in the State.

It is only necessary for the purposes of this petition to consider the undisputed evidence of Anna Laura Williams as to dependency upon her daughter for support and the contributions from her daughter for support.

The testimony of Anna Laura Williams (R. 77 to 88) was that at the time her daughter was killed she lived in New York City and had been living there over 5 years. Before that time she had lived in Waycross with her own mother and with her daughter, Billie D. Williams, and had looked after her mother for around 11 years. That she left Waycross and went to New York in August, 1944, because she could get more money there; that in New York she earned $30.00 per week and room and board, doing domestic work; while in New York she sent money home for the support of her mother and daughter, her daughter having remained in Waycross; that her daughter stayed and looked after Anna Laura's mother, the daughter's grandmother; that she depended upon her daughter, Billie D., to keep her informed about her mother, Billie D. doing all the writing; and that the daughter, Billie D., did practically everything for her grandmother, helping to wash and iron and cook and clean house and run errands for the grandmother. Some six months after her daughter's death, Anna Laura Williams moved back to Waycross and at the time of trial was working at Waycross and living with her mother.

On cross examination (R. 84) Anna Laura Williams, the plaintiff, testified:

> "Q. So you were in New York nearly 6 years? A. Yes, sir.
>
> Q. When you went to New York you got a position at $30.00 a week and your board and room? A. Yes, sir.
>
> Q. And you continued that work until you came back? I mean you got that much money? A. Yes, sir.

Q. Continuously until you moved back? A. Yes, sir.

Q. Were you discharged in New York? A. No, sir.

Q. You voluntarily quit your job up there and came back here? A. Yes, I did.

Q. Did you receive any money from your daughter to support you? A. No, sir, I did not.

Q. You rather supported your mother and your daughter yourself, did you not? A. Yes, sir.

Q. Except for what your mother made? A. Yes, sir.

Q. Your mother made some money, too? A. Yes, sir.

Q. As far as your own support, you did not receive any support from your daughter or any part of it? A. No, sir, I didn't.

Q. You didn't? A. No, sir.

Q. The services your daughter rendered were services she rendered to her grandmother? A. Yes, sir.

Q. Your mother? A. Yes, sir.

Q. She did not render any services to you for your own support? A. No, sir."

At the conclusion of the evidence defendants (now petitioners) moved for a verdict to be directed in their favor upon the ground that under the undisputed evidence Anna Laura Williams was not entitled to recover because there was no evidence to show that she was dependent upon her deceased daughter for her own support and that the evidence showed the deceased daughter did not contribute either in services or in money to the support of her mother (R. 187). This motion was overruled by the trial judge (R. 188).

The decision of the Court of Appeals, in affirming the lower court on this issue, is in conflict with the decision of the Supreme Court of Georgia in the case of *Georgia Rail-*

road & Banking Company v. *Spinks*, 111 Ga. 571, *and other cases decided* by the same court, construing the statute upon which the case is predicated.

B.

Statement of matter involved on question common to both cases.

These cases involved the usual negligent features incident to a collision between a school bus and a truck on the highway. The two plaintiffs sued the driver of the truck, its owner and its insurance carrier, and also the driver of the school bus. The owner of the truck, Central Truck Lines, Inc., was a motor common carrier operating under a certificate from the Georgia Public Service Commission, and under Georgia Code section 68-612 it was permissible for the insurance company to be sued jointly with the motor common carrier, although the liability is based on the negligence of the motor carrier, or its driver. The policy of insurance was attached to and made a part of the complaint. It was a large policy, with limits of $50,000.00 for any one injury, and $250,000.00 for any one accident. Although petitioners admitted the existence and effect of the policy in their answer, the trial judge in the midst of his charge inquired openly before the jury for an admission that the policy of insurance also covered the driver of the truck, Sherman B. Hogan, as well as Central Truck Lines (Record 221), and when counsel for petitioners suggested that the question of insurance was being magnified too much, the trial judge only told the jury that it made no difference to him who wins the case and that it was agreed that the insurance company was the insurer of Sherman B. Hogan and Central Truck Lines (Record 222). Petitioners specially requested in writing that the trial judge charge the jury as follows:

"I charge you further that the fact that Fireman's Fund Indemnity Company issued a policy of Liability insurance to protect Central Truck Lines, Inc. must not be considered by you in determining whether or not the defendant, Sherman B. Hogan the driver of the truck, is liable to the plaintiff under the instructions given you by the Court. The Court reminds you that you are sworn officers of the law under the highest duty of deciding this case upon the material issues and evidence, and if in determining whether or not Sherman B. Hogan was negligent you should be influenced to the least degree by the existence of the liability insurance policy of Fireman's Fund Indemnity Company, then your verdict would be an improper one, and one without proper foundation."

The request was refused and exception noted.

V.

Reasons Relied on for Allowance of Writ.

A.

On question involved only in Anna Laura Williams case.

1. The Georgia statute involved only gives a right of action to a mother for the homicide of a child upon whom she is dependent for support, *and* who contributes to her support. The Supreme Court of Georgia, in *Georgia Railroad & Banking Company* v. *Spinks*, 111 Ga. 571, 572, held that,

> "The condition of dependence contemplated by the General Assembly (statute) was that of the parent with relation to his or her personal need of aid in obtaining a livelihood. We cannot believe it was the legislative intention to assist a self-sustaining father in taking care of others whose support he had voluntarily undertaken or with which he was legally chargeable."

The same construction was applied by the Georgia Supreme Court with respect to a self-sustaining mother in the case of *Atlantic Coast Line Railroad Company* v. *McDonald,* 135 Ga. 635 (7-a), and *Savannah Electric Co.* v. *Bell,* 135 Ga. 663, 664. These cases have not been over-ruled, or even criticized, and were followed by the Court of Appeals for the Fifth Circuit in *Trammel* v. *Southern Ry. Co.,* 182 Fed. 789. In its present decision the Court of Appeals holds that, notwithstanding the mother was not dependent upon the child financially for support, but was independent, she might nevertheless be found to be dependent *for support* upon small services rendered by the child. This is contrary to the construction placed on this statute by the highest Georgia Court, and extends the Georgia statute far beyond any of the Georgia decisions, thus enabling litigants to recover under this statute in a Federal Court, where this would not be possible in a state court.

2. The Court of Appeals decision, in distinguishing this case from the *Spinks* case, *supra,* did so on the theory that in the *Spinks* case "the only contributions relied upon were those in money," and not "that the parent depended upon or received contributions from the child in the form of services." In this the Court of Appeals overlooked the fact that the theory upon which the Georgia courts hold that services rendered by the child can be considered as contributions to support, is that the services can be to some extent reduced to a money value, however small. The effect of the Court of Appeals decision is to write out of the Georgia decisions this theory, and to write into the *Spinks* case the proposition that if the son had rendered service to the self-sustaining father, rather than furnishing money, the decision would have been different. This conflicts with all the Georgia decisions, which will be cited in the accompanying brief.

3. The force or impact of the decision of the United States Court of Appeals is calculated to move in a wide orbit and, as contended here, where it is in apparent conflict with the true meaning of the Georgia statute, and the decisions of the Georgia Supreme Court, the Federal Court will fail in its duty to ascertain and apply state law in a case in which such law is controlling.

B.

As to question common to both cases.

1. It is almost universally recognized by the courts of all jurisdictions that the fact that a defendant in a negligence case is protected by liability insurance, when made known to a jury, tends to prejudice that defendant's case, on the theory that the defendant will not be harmed, but that the loss will fall upon an insurance company. In cases where the existence of insurance has been erroneously injected into a case, mistrials have been granted. In the cases where the fact that insurance exists is a relevant fact on some incidental issue, the courts have firmly stated that the jury should be cautioned not to consider it in regard to defendant's duty or liability to plaintiff. In these cases the Georgia law permitted the insurance company to be made a party and this necessarily permitted the jury to have knowledge of the insurance, but still this tended to produce the same harmful effect upon the jury as would be the case where the insurance feature was injected erroneously, or as relevant to some incidental issue, and common justice required that the jury be specially admonished not to consider the insurance in determining the question of negligence or liability.

2. The Court of Appeals' decision (193 F. 2d, 220, at p. 235) holds that in a case of this kind truthful references

to insurance could not magnify this as an issue, and that the language of the request might prevent the plaintiffs from securing a fair appraisal by the jury of the question of negligence. Thus the Court of Appeals has established a rule for the Fifth Circuit which is contrary to the rulings of all the other circuits. This Court should recognize the serious handicap to parties covered by insurance, and to insurance companies, since cases of this kind are now so numerous, and categorically hold that a trial judge cannot be too zealous in admonishing a jury to disassociate from their minds the insurance policy when considering the question of negligence. The question is of far reaching importance and warrants consideration and correction by this Court.

A supporting brief accompanies this petition.

Wherefore, petitioners respectfully pray that a writ of certiorari issue to review the judgment complained of, and that said judgment may be reversed by this Honorable Court.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

1.

Decisions of the Courts Below.

The opinion of the United States Court of Appeals for Fifth Circuit is shown in the record at page 260, and is reported in 193 F. 2d 220. The opinion of the District Judge is shown in the record at page 235.

2.

Jurisdiction.

The jurisdiction of this Court is invoked under section 1254 (1) of the Judicial Code (28 U. S. C. A. 1254 (1)), upon the ground that the Circuit Court has decided questions contrary to local law and to decisions of other Circuit Courts.

3.

Statement of Case.

A statement of the matters involved appears in subdivision IV A and B of the petition, for certiorari, and in the interest of brevity is not repeated.

4.

Questions Presented.

These questions are stated in subdivision III A and B of the foregoing petition and for sake of brevity will not be repeated.

5.

Specification of Errors.

In Anna Laura Williams Case.

1. The Circuit Court rendered its decision contrary to the Georgia Statute and the decisions of the Supreme Court of Georgia, in deciding that under the undisputed facts the mother was dependent upon her deceased daughter for support, and that the daughter contributed to her mother's support.

2. The Circuit Court erred in failing to apply the law of Georgia, that a person testifying in his own behalf is not entitled to a finding in his favor if that version of his testimony the most unfavorable to him shows that the verdict should be against him.

On Question Common to Both Cases.

3. The Circuit Court erred in holding that the trial judge was not required to charge the jury that they should not consider the insurance in determining the question of negligence, contrary to the decisions of other Circuit Courts, and of the appellate courts of Georgia.

6.

Argument.

1. The Circuit Court rendered its decision contrary to the Georgia Statute and the decisions of the Supreme Court of Georgia, in deciding that under the undisputed facts the mother was dependent upon her deceased daughter for support, and that the daughter contributed to her mother's support.

The evidence shows without dispute that the mother, Anna Laura Williams, several years prior to the accident,

had moved to New York and was living there at the time of the daughter's death. The daughter remained in Waycross and lived with her grandmother, Claudia Myrick. The services rendered by the daughter were rendered to the grandmother. The daughter wrote to her mother in New York and the mother sent money home, both for the daughter and the grandmother, and the daughter disbursed this money for these purposes. The daughter also ran errands. It was contended that the mother was enabled to go to New York because of the fact that the daughter stayed home and looked after the grandmother.

The Circuit Court of Appeals in its opinion held that the writing of letters to the mother in New York, the disbursing of funds sent by the mother for the support of the daughter and grandmother, the running of errands and the fact that the daughter stayed with the grandmother, enabling the mother to free herself and go to New York, were sufficient to constitute dependency and contribution under the Georgia law. We submit that this is contrary both to the Statute and to the decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia construing the Statute.

The Statute involved is Code Section 105-1307 of the Code of Georgia of 1933, as follows:

> "*Homicide of child.*—A mother, or, if no mother, a father, may recover for the homicide of a child, minor or *sui juris,* upon whom she or he is dependent, or who contributes to her or his support, unless said child shall leave a wife, husband, or child. The mother or father shall be entitled to recover the full value of the life of such child."

Under the decisions of the Supreme Court of Georgia construing this statute, the word "or" before the words

"who contributes" should be construed to mean "and". In other words, the Statute requires both dependency *and* contribution.

Clay v. *Central Railroad and Banking Company*, 84 Ga. 345;
Smith v. *Hatcher*, 102 Ga. 158.

In the case of *Georgia Railroad and Banking Co.* v. *Spinks*, 111 Ga. 571, a father sued for the death of a minor son. The son's mother was dead. The father had married again and he and his second wife had minor children. The father made enough to support himself but not enough to support himself *and* his second wife and minor children. The deceased son had contributed to the father to help him support his family. The Supreme Court of Georgia held that under these facts and circumstances the father was not dependent on the son within the meaning of the Statute. This case, we submit, is directly contrary to the holding of the Circuit Court of Appeals in this case.

Insofar as the case under consideration is concerned the evidence clearly showed that the mother in this case was not dependent on the daughter for support and that the daughter did not contribute any money to her support.

The Circuit Court of Appeals, however, held that the services performed by the daughter were sufficient to form the basis for dependency and support. In this connection see the case of *Fuller* v. *Inman*, 10 Ga. App. 680, in which the Court of Appeals of Georgia held that the mother could recover for the death of a child where the child rendered services for her around the house, etc. In discussing the question of dependence, the Court says on page 687:

> "The dependence and contribution to support must not be fanciful. It must not be imaginary; it must be real; it must be actual; it must be to such an

> extent as substantially or materially to aid the parent."

On page 689 the Court points out that the child need not contribute money but that if he performed substantial services in and about the household, etc., this is a contribution to her support.

We respectfully submit that the holding of the Circuit Court of Appeals that the alleged services were sufficient to constitute the basis for dependency and contribution is contrary to the Statute and the Georgia decisions construing the Statute hereinabove referred to for the following reasons.

In the first place, in the case of *Fuller* v. *Inman*, 10 Ga. App. 680, on page 688, the court states: "The statute contemplates individual dependence." We submit that the Statute and decisions contemplate, therefore, that the services, in order to form the basis of dependency and contribution, must be of a personal nature and rendered to the dependent parent. Also, in the case last cited, on page 689, the Court says:

> "If he performs substantial services, of which she receives the benefit *in and about the household*, this is contribution to her support, and she is dependent upon that child, within the meaning of the law, . . ." (Emphasis supplied.)

We submit also that the contemplation of the Statute and the Georgia decisions is that these services shall be rendered in and about the household. In other words, if a child aids with the cooking, washing dishes, making beds, cleaning house and things of that nature, under our Georgia decisions such services may form the basis for dependency and contribution.

In the case under consideration, the services rendered by the daughter were not rendered to the mother but to the grandmother. The mother herself testified to this effect (R. 85):

> "Q. The services your daughter rendered were services she rendered to her grandmother? A. Yes.
> Q. She did not render any services to you for your support? A. No, sir."

The services were not personal to the mother at all and were not even rendered to her but were rendered to the grandmother and certainly they were not rendered in and about the household of the mother since the mother lived in New York and the daughter remained in Waycross, Georgia, with her grandmother and it was in Waycross that the alleged services were supposed to have been rendered.

In the next place, to say that writing letters to the mother, which may have had the effect of giving the mother a certain peace of mind, constituted such a service as would be the basis of dependency and contribution seems to us more imaginary than real. Also, the same applies to the running of errands. How could the running of errands by the daughter in Waycross be the basis for dependency and support of the mother living in New York?

Likewise, to say that the fact that the daughter stayed with the grandmother and thereby enabled the mother to go off to New York where she could make more money constituted dependency and contribution is not sound and is more fanciful than real. It seems to us that it is much more realistic to say that this was more a matter of convenience to the mother and it is more likely that the grandmother, by taking care of the child and providing a home for her, is the one who enabled the mother to be freed of her parental responsibilities so that she could go to New York and make more money.

In addition, the holding that the disbursing of the money sent home by the mother for the daughter and grandmother as a basis for dependency and contribution is certainly trivial and fanciful. Such services were not rendered to the mother but to the grandmother and were not rendered in the mother's household in New York but in Waycross, Georgia. If this in fact might have contributed to the peace of mind of the mother far away in New York, this was merely incidental, and surely, was not substantial enough to constitute dependency and contribution. Any child merely by being happy and well contributes to the peace of mind of the parent.

By way of illustration, let us suppose a case where a widowed mother has a minor child to support. If she has to make a home for that child and be at home most of the time with the child, she can do certain types of work. But if she can send the child away to boarding school, she can then free herself of her parental responsibilities and go out and get herself a better job. How can it logically be said that in this situation the mother, by sending the child away to boarding school, is thus dependent on the child for support? With all due respect to the Circuit Court of Appeals, it seems to us that this is absurd and it certainly is not in accord with the statute and the decisions of Georgia hereinabove referred to. We respectfully submit that it would be even more absurd to say that if the child writes home from boarding school and thereby contributes to the peace of mind of the mother, that this is a basis for dependency and support. This is not what the Statute and the Georgia decisions above hold.

As above pointed out, the services relied on as the basis for dependency and support, by the testimony of the mother herself, were rendered not to the mother but to the grandmother. The holding of the Circuit Court of Appeals that

such services thus rendered to the grandmother may form the basis of dependency and support is, we submit, directly contrary to the holding of the Supreme Court of Georgia in the case of *Georgia Railroad and Banking Co.* v. *Spinks*, 111 Ga. 571, hereinabove referred to. That case, it is true, involved a contribution in money, but it is clear that the same rule applies to contribution in services. We submit that the effect of the holding in that case would be that a contribution in services to someone other than the parent could not be the basis for dependency and contribution. As applied to the case under consideration, we submit the effect of the holding in the *Spinks* case is that the furnishing of services to the grandmother could not be the basis of dependency and contribution to the mother and that, accordingly, the holding of the Circuit Court of Appeals that such services do form the basis for dependency and contribution is directly contrary to the holding in the *Spinks* case above referred to. In this connection, see also the case of *Trammell* v. *Southern Railway Co.*, 182 Fed. 789.

2. The Circuit Court erred in failing to apply the law of Georgia, that a person testifying in his own behalf is not entitled to a finding in his favor if that version of his testimony the most unfavorable to him shows that the verdict should be against him.

The evidence of the plaintiff, testifying in her own behalf (R. 84-85) was positive that she was not dependent for support upon contributions either in money or services of the daughter. This evidence must be construed most strongly against the plaintiff and conclusively shows that she was not entitled to recover under the repeated rulings of the Supreme Court and Court of Appeals of Georgia. The Circuit Court failed to apply the principles of the following Georgia authorities:

"A person testifying in his own behalf is not entitled to a finding in his favor if that version of his testimony the most unfavorable to him shows that the verdict should be against him."

Southern Bank v. *Goetee*, 108 Ga. 796 (2);
Southern Railway Co. v. *Hobbs*, 121 Ga. 428 (1);
Gardner v. *Smith*, 39 Ga. App. 224 (4);
Butler v. *Morgan*, 40 Ga. App. 304 (2);
Stevens v. *Green*, 42 Ga. App. 512 (4);
Farrell v. *Barrett*, 54 Ga. App. 104 (1);
Thompson v. *Metropolitan Life Ins. Co.*, 45 App. 90 (2);
Davis v. *Akridge*, 199 Ga. 867 (2);
Weatherford v. *Weatherford*, 204 Ga. 553, 554;
Whitfield v. *Potts*, 205 Ga. 259, 272;
Partian v. *King*, 206 Ga. 530;
Ray v. *Marrett*, 84 Ga. App. 86.

Also the Federal authorities:

Drennen v. *Heard*, (5 Cir.), 211 Fed. 335 (2);
Clark Thread Co. v. *Willimantic Linen Co.*, 140 U. S. 481, 488, 35 L. ed. 521.

On Questions Common to Both Cases.

3. The Circuit Court erred in holding that the trial judge was not required to charge the jury that they should not consider the insurance in determining the question of negligence involved.

Although the insurance company was a legal party ~~plaintiff~~ defe, its liability was dependent upon a finding of negligence against Sherman B. Hogan, driver of the truck.

The suits alleged the existence of the large insurance policy (R. 2 and 14), which was the only reference to insurance that was necessary to establish the reason for the insurance company as a party.

The trial judge charged the jury (R. 216):

> "In no event could you find a verdict against the insurance company unless you found a verdict against Central Truck Lines, Inc., or Sherman B. Hogan, and the amount against the insurance company can in no wise exceed its limit under its policy which is $50,000.00 in each case."

Also the trial judge charged (R. 220, 221):

> "In that connection I charge you that if you find a verdict against the defendant, Sherman B. Hogan, it is necessary for you to find a verdict against the defendant Central Truck Lines, Inc., inasmuch as he admitted he was their agent. In other words if you find a verdict against the defendant Sherman B. Hogan, you will have to find against the defendant Central Truck Lines, Inc. and the insurance company in the case in which they are sued jointly with Sherman B. Hogan."

But these instructions did not caution the jury not to consider the fact of insurance in determining the question of negligence.

Then in the midst of the charge the trial judge (R. 221) openly inquired whether the insurance policy covered the driver, Hogan, and insisted on an answer, and instructed the jury that the insurance company was the insurer of Hogan as well as Central Truck Lines, although counsel insisted that the question of insurance was being unduly magnified.

Since it made no difference to any issue whether Hogan was protected or not, and the action of the trial judge tended to magnify the insurance feature, petitioners filed a written request to charge in the following language (R. 203):

> "I charge you further that the fact that Fireman's Fund Indemnity Company issued a policy of

liability insurance to protect Central Truck Lines, Inc. must not be considered by you in determining whether or not the defendant, Sherman B. Hogan the driver of the truck, is liable to the plaintiff under the instructions given you by the Court. The Court reminds you that you are sworn officers of the law under the highest duty of deciding this case upon the material issues and evidence, and if in determining whether or not Sherman B. Hogan was negligent you should be influenced to the least degree by the existence of the liability insurance policy of Fireman's Fund Indemnity Company, then your verdict would be an improper one, and one without proper foundation."

The trial judge at no time particularly cautioned the jury not to consider the existence of insurance in determining the question of negligence.

This is contrary to the duty of the trial judge, as illustrated by the Court of Appeals of the District of Columbia in the case of *Paxson* v. *Davis*, 65 F. 2d, 492 at page 495, where it said:

> "Such evidence, however, may be admitted where it is material as tending to establish an incidental fact in issue, as for the purpose of showing the interest or bias of a witness as an agent of an insurance company, but, where it is so admitted, *the court should caution the jury to receive it only for such purpose and not to consider it in regard to defendant's duty or liability to plaintiff*. (Emphasis supplied.)

And the same Circuit Court in the case of *Brooke* v. *Croson*, 58 F. 2d 885, 886 (C. C. D. C.), has emphasized that evidence of insurance is not relevant to the issue of negligence in the following language:

> "It is established by the overwhelming weight of authorities that as a general rule it is reversible

error in the trial of an action for damages for personal injury to permit the plaintiff to introduce evidence to show that the defendant is protected by liability insurance against such accidents. It is held that such evidence is not *relevant to the issue of negligence,* and can have no effect but to induce a verdict based on the fact that an insurance company, and not the defendant, must pay the award". (Emphasis supplied.)

Whether the fact that insurance existed was erroneously injected into the case, as in *Brooke* v. *Croson, supra,* and in *Minnick* vs. *Jackson,* 64 Ga. App. 554, or whether it was legally before the jury on an incidental issue, as in *Paxson* v. *Davis, supra,* the prejudicial effect is recognized, as is the duty of the trial judge to clearly and firmly admonish the jury not to let this fact affect them in their determination of negligence.

It is, therefore, submitted that the decision of the Court of Appeals that "it is difficult to see how truthful references to the fact of insurance could be said to magnify the fact any more than was already apparent to the jury", is in conflict with the above decisions of the Court of Appeals of the District of Columbia, and of the Court of Appeals of Georgia.

The request to charge was correct in principle, and substantially in the same language used by the trial judge to admonish the jury in *Maryland Casualty Co.* v. *Kelly* (4 Cir.), 45 F. 2d 788, 789.

It is difficult to see how the language of this request "might prevent the plaintiffs themselves from securing a fair appraisal by the jury of the question of negligence", as ruled by the Court of Appeals. As a matter of fact the instruction must be in strong and unmistakable terms, else a mistrial should be declared. The Georgia Court of

Appeals in the case of *Minnick* v. *Jackson*, 64 Ga. App. 554, 560, held that a mistrial should have been declared because the instructions of the judge were not sufficiently strong, saying

> "The plaintiff's voluntary introduction into evidence that the defendant had insurance was calculated to suggest to the jury that any damages found in favor of the plaintiff would be paid by the insurance company, and was highly prejudicial to the defendant's cause. We think it tended to relax the consciences of the jurors trying the case and render them less responsive to their oaths to do impartial justice between the parties. We do not think the mere exclusion of the evidence, the subtle rebuke of counsel, and the mild direction which the court gave the jury with reference to the evidence, had the effect of disabusing the prejudicial impression this evidence must have created on the minds of the jury."

Conclusion.

1. As to the right of Anna Laura Williams to recover the logical effect of the holding of the Circuit Court of Appeals in this case is to nullify the provisions in the Georgia Statute requiring dependency and contribution. This is so for the reason that, if the facts, as shown in the case under consideration, provide a basis for dependency and contribution under the Georgia Statute, then it is difficult to conceive of any case in which dependency and contribution could not be shown, and the effect, therefore, is to nullify these provisions. We respectfully submit that this holding by the Circuit Court of Appeals is directly in conflict with the Statute and decisions of Georgia hereinabove referred to.

2. On the question of the insurance feature, common to both cases, it is respectfully submitted that the only way to even approach justice to defendants when a large liability insurance policy is before the jury is for the trial judge to especially admonish the jury in line with the special request made in these cases. The decision of the Circuit Court for the Fifth Circuit is contrary to the decisions of the Circuit Court for the District of Columbia, and others, including the Appellate Courts of Georgia.

3. On both questions, it is submitted that the Circuit Court has failed to apply well established principles of law, on vital and far-reaching issues, and that a writ of certiorari should be granted to review and reverse the decision of the Circuit Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 675

SHERMAN B. HOGAN, CENTRAL TRUCK LINES, INC., AND FIREMAN'S FUND INDEMNITY COMPANY,
Petitioners,

versus

ANNA LAURA WILLIAMS AND CARRIE JACKSON,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 675

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Petitioners,

versus

ANNA LAURA WILLIAMS AND CARRIE JACKSON,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY STATEMENT OF CONTROVERSY.

The Petitioner seeks access to this Court on the ground that the evidence did not show dependency and contribution under the Georgia statute, that the Circuit Court failed to apply the Georgia law to the effect that the version of the plaintiff's testimony most unfavorable to him must be accepted, and that the trial Court erred in refusing to give a requested cautionary instruction to the jury to the effect that "the court reminds you that

you are sworn officers of the law under the highest duty of deciding this case upon the material issues and evidence, and if in determining whether Sherman B. Hogan was negligent you should be influenced to the least degree by the existence of the liability insurance policy—then your verdict would be an improper one and without proper foundation." We show in the second subdivision of this brief, page 3, that Petitioners' contentions are without merit.

The opinion of the Circuit Court is reported as *Sherman B. Hogan, et al. v. Anna Laura Williams, et al.*, 193 F. 2nd 220, and was rendered on December 7, 1951; rehearing was denied on January 9, 1952. (R-288.)

The petition should be denied because:

1. No reason is shown to justify this Court in granting certiorari.
2. The Circuit Court properly held that the evidence showed dependency and contribution under the Georgia statute.
3. The Circuit Court properly refused to reverse the case upon the ground that plaintiff's evidence taken in the light most unfavorable to her, shows that verdict should be against her.
4. The Circuit Court properly held that the trial judge was not required to give requested cautionary instruction as to insurance policy.

1. NO REASON IS SHOWN TO JUSTIFY THIS COURT IN GRANTING CERTIORARI.

The decision is not in conflict with decisions of other courts of appeal, the Georgia Appellate Courts, nor with any decision of this Court. The questions decided are not new ones. They are recognized by all the courts.

The question of applying the version of plaintiff's testimony which is most unfavorable to her is simply a matter of appraisal of the evidence for the jury.

The petition does not measure up to Rule 38 (5-b) of this Court.

United States v. Rimer, 55 L. Ed. 578.
Magnum Import Co. v. DeSpoturno Coty, 262 U. S. 159, 67 L. Ed. 922, 924.
Southern Power Co. v. North Carolina Public Service, 263 U. S. 508, 68 L. Ed. 413.

The case is one which turns merely on an appraisal of evidence and hence did not involve an issue of importance to the operation of the Federal system.

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2. THE CIRCUIT COURT PROPERLY HELD THAT THE EVIDENCE SHOWED DEPENDENCY AND CONTRIBUTION UNDER THE GEORGIA STATUTE.

This action is brought under the provisions of Sec. 105-1307, Ga. Code Ann., as follows:

> "A mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, upon

whom she or he is dependent, or who contributes to her or his support, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child."

Petitioners contend that there was no dependency or contribution in the *Williams* case as contemplated by the statute, their specific contention being that the services rendered by the deceased were rendered to her grandmother, that plaintiff made sufficient money to support herself, and that any contribution made by the deceased to plaintiff was an indirect contribution. Appellants base this contention largely upon plaintiff's statement on cross examination that she did not receive "support" from the deceased. This was an isolated statement in response to a specific question on cross examination using the word "support", and such contention overlooks all the other evidence of plaintiff clearly showing dependency and contribution as provided by the statute. Clearly, plaintiff, an uneducated negro women, understood the word "support" to mean furnishing sufficient money for a livelihood. Most people would so understand the word, and Webster's Dictionary so defines it. Neither plaintiff nor most other people would have understood the word to include only services. This is particularly true where counsel frames his question as was done in this case. It was: "Did you receive any money from your daughter to support you?" (Record, 85.)

The plaintiff testified: Both her husband and father had been dead for more than fifteen years, her mother was a widow and plaintiff was the oldest child. Plaintiff

and her only child, Billie D. Williams, stayed in the home with plaintiff's mother for eleven years before plaintiff went to New York, and plaintiff cared for her ailing mother. Before going to New York plaintiff did domestic work in Waycross and most she ever earned was $7.00 per week. Plaintiff went to New York in 1944 so that she could earn more money, and while in New York earned $30.00 per week, besides room and board. The deceased daughter remained in Waycross and took the place of plaintiff in looking after plaintiff's mother. Decedent slept with plaintiff's mother nightly, helped her with practically everything including washing, ironing, cooking, cleaning house and running errands. From her larger earnings plaintiff sent money to her daughter to be used in supporting the daughter and plaintiff's mother. The daughter did all the writing, wrote plaintiff every week, and plaintiff depended on deceased to KEEP HER INFORMED ABOUT PLAINTIFF'S MOTHER. While in New York plaintiff would write her daughter to run errands for her, which deceased did. The fact that deceased stayed with and looked after plaintiff's mother saved plaintiff from hiring someone else to look after her mother. Plaintiff could not and would not have gone to New York if her daughter had not remained here to look after her mother. The daughter performed all these services for plaintiff and plaintiff was dependent upon her for such services. Since daughter's death plaintiff had to give up job in New York and return to Waycross to care for her mother; most she has been able to earn since returning to Waycross is $10.00 per week; since returning has looked after mother same as deceased did; would not have moved back to Waycross if daughter had

lived. All the services performed by daughter were performed from time plaintiff went to New York until her death. (Record, pages 77 to 83.)

The question of whether dependency and contribution have been shown is for the jury.

Scott vs. Torrence, 69 Ga. App. 309, 313, (25 S. E. 2nd 120, 125).

Crawford vs. Southern Ry., 106 Ga. 870 (3), (33 S. E. 826).

James vs. Central of Georgia Ry., 138 Ga. 415 (1), (75 S. E. 431).

Montgomery vs. Southern Ry. Co., 78 Ga. App. 370 (2c), (51 S. E. 2nd 66).

In *Scott vs. Torrence, supra,* it is held:

"A great many cases arising under this section (Ga. Code Ann. 105-1307) have been before our appellate courts, and in only a few has it been held that the question presented had resolved itself into one of law. In the majority of instances it has been held that the jury should pass on the facts and decide the question under proper instructions of the court (page 312.)— There are many other authorities which clearly indicate that except in unusual cases the decision of the question whether the plaintiff has brought herself within the terms of the Code section should be left to the jury even though the facts presented are not disputed. (Page 313.) It is clear from the authorities that the words 'dependent' and 'contributes' in the statute are flexible words and are to be differently interpreted in different sets of facts, and, **except in clear and unusual cases, it is for the jury to decide whether a plaintiff has brought herself within the**

terms of the section when she has concluded her evidence." (Page 318.)

The clear and unusual cases in which verdict may be directed, as referred to in the *Torrence* case, are cases in which the evidence showed conclusively that the child was incapable of making contribution, as in the case of a baby or handicapped person, or in cases of contribution in money that the child was either not contributing at all, or the parent's earnings were amply sufficient to support him.

Appellant's brief lays great stress upon the argument that plaintiff earned enough to support herself, and strongly urges that under no condition is a plaintiff entitled to recover where her earnings are sufficient to support her, apparently interpreting the word "support" to mean support in **money** only. SUCH ARGUMENT ENTIRELY IGNORES THE EVIDENCE THAT PLAINTIFF WAS ABLE TO EARN ONLY $7.00 PER WEEK BEFORE GOING TO NEW YORK (R-79), AN INSUFFICIENT AMOUNT TO SUPPORT HER, AND THAT SHE COULD NOT HAVE LEFT HOME AND HAD THE HIGHER EARNINGS OF $30.00 PER WEEK EXCEPT FOR THE SERVICES RENDERED BY THE CHILD; THAT THE FACT THAT SHE HAD SUFFICIENT EARNINGS TO SUPPORT HER DEPENDED ON THE SERVICES OF THE CHILD (R-78 to 81). SAME ALSO IGNORES THE FACT THAT A CONTRIBUTION IN SERVICES ALONE FULLY MEETS THE STATUTE. ALSO RULING IN *SCOTT VS. TORRENCE, SUPRA,* IN WHICH THE FATHER HAD INCOME OF $6000.00 AND WAS AMPLY SUPPORTING THE MOTHER (plaintiff).

The Georgia Courts unanimously recognize that the support and contribution referred to in the statute may be either in money or in services. *Reid vs. Moyd,* 186 Ga. 578, (198 S. E. 703); *Scott vs. Torrence,* 69 Ga. App. 309 (25 S. E. 2nd 120); *Indian Springs Swimming Pool Corp. vs. Maddox,* 70 Ga. App. 842, 845 (29 S. E. 2nd 724); *City Ice Delivery Co. vs. Turley,* 44 Ga. App. 32 (160 S. E. 517); *Savannah Electric Co. vs. Thomas,* 30 Ga. App. 405, 406 (6) (118 S. E. 481). A mother may be dependent upon the child notwithstanding she may contribute more to his support in value than he contributes to her support, *Scott vs. Torrence, supra,* page 313, *Reid vs. Moyd, supra.* The dependency need only the partial, *Reid vs. Moyd, supra,* and it is the fact of contribution and not the legal obligation to make it that the statute makes the ingredient of the cause of action. *Savannah Electric Co. vs. Bell,* 124 Ga. 663, 665 (53 S. E. 109, 111); *Fuller vs. Inman,* 10 Ga. App. 680, 689 (74 S. E. 287). The Georgia Courts have sustained recovery where the dependency is only slight, *Reid vs. Moyd, supra; Gay vs. Smith,* 51 Ga. App. 615, 617 (181 S. E. 129); *Western Union Telegraph Co. vs. Harris,* 6 Ga. App. 266 (64 S. E. 1123). If the mother gets the benefit of the child's labor she is dependent in a legal sense. *Fuller vs. Inman, supra; Scott vs. Torrence, supra.*

Appellant's position is that the service rendered by the child was an indirect service to the mother, the argument being that plaintiff was under no obligation to care for her mother, and that plaintiff's mother was the actual beneficiary of the services. Such contention overlooks the evidence of services indisputably rendered to plaintiff alone, that is that the child did all the writing, wrote her

every week, and kept plaintiff informed about her mother; that plaintiff would write the child to run errands in Waycross for her, which the child did; that the child received and disbursed the money which plaintiff regularly sent for the support of plaintiff's mother; and plaintiff was dependent on her for all these services. (R. 80, 81, 91.)

In *Reid vs. Moyd, supra,* (on page 582) Justice Grice, speaking for the Supreme Court says: "Who can say that it is not a service, and a valuable service, to the tired father to have the little fellow bring him his slippers in the evening? to the housewife to have the child bring her this or that article used in her housework? to watch for and announce the approach of the postman, and the ice delivery man? and a dozen other similar services that will readily occur to one, particularly if he be blessed with children?" IN THE CASE AT BAR, BY ANALOGY, WE ASK: WHO CAN SAY THAT IT IS NOT A SERVICE, AND A VALUABLE SERVICE, FOR THE CHILD TO WRITE PLAINTIFF EVERY WEEK AND KEEP PLAINTIFF INFORMED ABOUT HER AILING MOTHER? TO RUN ERRANDS FOR PLAINTIFF WHEN PLANTIFF WROTE HER TO DO SO? TO RECEIVE AND DISBURSE THE MONEY WHICH PLAINTIFF SENT FOR THE SUPPORT OF BOTH HER DAUGHTER AND MOTHER? The Georgia Courts hold that it is exclusively in the province of the jury to say. SUCH SERVICES ALONE MEET THE STATUTE REGARDLESS OF THE SERVICE RENDERED BY THE CHILD IN CARING FOR PLAINTIFF'S MOTHER.

And the Circuit Court properly held that the services of the child in staying in Waycross and caring for plaintiff's

mother, thereby enabling plaintiff to leave home and earn substantially higher wages, was likewise a direct service to plaintiff. Plaintiff testified that such service saved her from hiring someone else to look after her mother. In the case of *Indian Springs etc. vs. Maddox,* 70 Ga. App. 842, 845, (29 S. E. 2nd, 724, 726) the services of the child saved the mother from hiring someone else, and was held sufficient. In *Scott vs. Torrence, supra,* part of the services of the child were to the father in his store, of which the mother got the benefit, and such is approved by the court as a service to the mother.

We think this situation would be analogous: A lawyer has the opportunity of accepting an appointment to a Circuit Court. His duties would require that he be away from home a great deal of the time. His aged mother lives in the home with him and he cares for her in addition to a minor child living in the home. He is unable to be away from home and leave his mother alone unless the child will remain at the home and look after the mother while he is away. This the child does, and he is thereby enabled to accept the appointment. We submit that no greater service could be rendered by the child.

The cases relied on by petitioner on this point are clearly distinguished from the case at bar in the decision of the Circuit Court, reported in 193 Fed. 2nd, 220.

It is a pertinent fact that at the January Session, 1952, of the Georgia Legislature, the dependency and the contribution features of Georgia Statute 105-1307 were eliminated.

Such Act was approved on February 11, 1952, and is as follows:

SENATE BILL No. 173
ACT No. 602

AN ACT

"To amend Section 105-1307 of the Code of Georgia of 1933, which section relates to suits for the homicide of a child, so as to remove the provisions relating to dependency and contribution, and to provide that in suits by the mother the illegitimacy of the child shall be no bar to recovery; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA AS FOLLOWS:

Section 1.

Section 105-1307 of the Code of Georgia of 1933, which section relates to suits for the homicide of a child, is hereby amended by striking the words 'upon whom she or he is dependent, or who contributes to her or his support,' and by adding at the end thereof the words: 'In suits by the mother, the illegitimacy of the child shall be no bar to a recovery,' so that said section when so amended, shall read as follows:

'105-1307.—A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband or child. The mother or father shall be entitled to recover the full value of the life of such child. In suits by the mother the illegitimacy of the child shall be no bar to a recovery.'

Section 2.

All laws and parts of laws in conflict with this Act are hereby repealed."

It is elementary that remedial statutes are retroactive.

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3. THE CIRCUIT COURT PROPERLY REFUSED TO REVERSE THE CASE UPON THE GROUND THAT PLAINTIFF'S EVIDENCE TAKEN IN THE LIGHT MOST UNFAVORABLE TO HER SHOWS THAT VERDICT SHOULD BE AGAINST HER.

Petitioner relies on isolated answers of the plaintiff Williams to questions propounded on cross examination, which questions were framed in such a way that the plaintiff would likely be misled. For instance, the two main questions and answers relied on are: (R-84)

Q. Did you receive any money from your daughter to support you?

A. No, sir, I did not.

Q. She did not render any services to you for your own **support?**

A. No, sir.

It will be noted that in the *Williams* case the plaintiff did not rely on support in money, but relied on services rendered, and the manner in which counsel framed his question with reference to services, that is, "she did not render any services to you for your own **support,**" would likely mislead even an intelligent person, and particularly an ignorant negro woman. It is apparent from plaintiff's

testimony that she was simply an ignorant negro woman. When we speak of **Support** any ordinary layman would assume this to mean furnishing food, clothes and shelter.

We have discussed the evidence on this score fully on pages 4 to 6 of this brief, and in the interest of brevity will not repeat same here. The question is solely one of appraisal of evidence.

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4. THE CIRCUIT COURT PROPERLY HELD THAT THE TRIAL JUDGE WAS NOT REQUIRED TO GIVE REQUESTED CAUTIONARY INSTRUCTION AS TO INSURANCE POLICY.

Petitioners contend that the Circuit Court should have reversed the case because of the failure of the court to give a requested cautionary instruction which is in substance that "the court reminds you that you are sworn officers of the law under the highest duty of deciding this case upon the material issues and evidence, and if in determining whether Sherman B. Hagan was negligent you should be influenced to the least degree by the existence of the liability insurance policy—then your verdict would be an improper one and without proper foundation". (Record, page 203.)

The court did charge the substance of this request. The court charged as follows:

> "Now, gentlemen of the jury, it is your duty to find the truth of this case under the rules of evidence and under the rules of law as given you in charge. I

charge you that you cannot find a verdict against the defendants or either of them because the defendants or either of them are insurance companies, nor can you find a verdict one way or the other on account of the persons involved. You cannot find a verdict one way or the other because one or more persons were killed, but you must find a verdict that will speak the truth under the evidence in the case and the rules of law as given you in charge by the court." (Record, page 219.)

"A party has no vested interest in any particular form of instruction; even though a proffered prayer may be unobjectionable in itself, standing alone, as a statement of law—it is for the trial judge to determine the language of instructions."

Cohen vs. Evening Star Newspaper Co., 113 Fed. 2nd 523 (3-4) (5th Cir.).

"Where it appears on examination of entire charge that the jury has been fairly and adequately instructed, the requirements of the law are satisfied—and the trial court did not err in refusing to give five prayers for instructions offered."

Cohen vs. Evening Star Newspaper Co., supra.

"The action of the trial court in refusing to give the jury ten requested instructions is challenged. There is no need to discuss separately the several instructions. THE CASE WAS ONE FOR THE JURY. The instructions of the court fairly, substantially and adequately covered the material issues in the case. AND EVEN THOUGH THE REQUESTED INSTRUCTIONS ARE CORRECT STATEMENTS OF THE LAW, THE COURT IS NOT REQUIRED TO GIVE THEM IF THE

SUBJECT MATTER HAS BEEN APPROPRIATELY COVERED BY INSTRUCTIONS ALREADY GIVEN."

Missouri K. & T. R. Co. vs. Jackson, 174 Fed. 2nd 297, 301 (8) (10th Cir.).

Sou. Ry. Co. vs. Harris, 123 Fed. 2nd 7 (5th Cir.).

Alabama, etc. Ry. vs. O'Brien, 69 Fed. 223 (5th Cir.).

Woodstock Operating Co. vs. Young, 268 Fed. 278 (5th Cir.).

Tway vs. Seneca Motor Car Co., 284 Fed. 265 (5th Cir.).

Ins. Co. of North America vs. Fourth Nat. Bank, 28 Fed. 2nd 933 (3) (5th Cir.).

Luke vs. United States, 84 Fed. 2nd 823 (5th Cir.).

Under Georgia law it is permissible to join a liability insurance carrier in action against common carrier or its driver.

Great American Indemnity Co. vs. Vickers, 183 Ga. 233, 188 S. E. 24.

Tarrant vs. Davis, 62 Ga. App. 880, 10 S. E. 2nd 636.

Petitioner contends that the requested charge was necessary because the Judge during his charge asked counsel whether the insurance policy covered the driver Hogan. This could not be harmful because it was admitted in the pleadings, was the truth of the case, and there is no rule limiting number of times truth may be stated in the charge. In answer to such question by the court, counsel for appellant stated that such insurance policy did cover the driver Hogan. (Record, page 221.)

"That the court in its charge unduly reiterated statement that burden of proof was upon plaintiff did not show error, since there is no rule limiting the

number of times that truth or any other truth may be restated by a federal judge in a charge which on the whole is fair and accurate."

Palmer vs. Miller, 145 Fed. 2nd 926 (8) (8th Cir.).
Louisville & N. R. Co. vs. Morlay, 86 Fed. 240 (3) (7th Cir.).

The request is for a purely cautionary instruction.

"—the question of when and to what extent instructions of this nature (caution against sympathy, prejudice or passion) shall be given rests very largely in the sound and impartial discretion of the court."

53 Am. Jur. par. 822, page 604.
Kelly vs. Chicago, R. I. & P. Ry. Co., 114 N. W. 536 (128 Am. St. Rep. 195).
State vs. Megorden, 88 Pac. 306 (14 Ann. Cas. 130).

"In action by a servant, injured by an explosion of caps used to detonate dynamite, THE REFUSAL OF A CAUTIONARY INSTRUCTION, REQUESTED BY THE MASTER,—WAS PROPER."

Titusville Fruit & Farm Lands Co. vs. Porter, 249 Fed. 442 (3) (5th Cir.).

The Circuit Court properly held that such requested charge "could be considered as argumentative, or at least as containing intimation which, because of the language employed, might prevent the plaintiffs themselves from securing a fair appraisal by the jury of the question of negligence," and that in cases where it is proper to join the insurance company as a party, such as the present case, the fact that the question of insurance is before the jury "is a consequence of the law and the business conducted by the insured".

CONCLUSION.

It is perfectly apparent that this is only the sort of case which it has been stated on high authority, though by way of dissent, should not be permitted to engage the attention of this Court, which ought, as necessarily it must, to be devoted to "cases that demand adjudication on the basis of importance to the operation of our federal system; importance of outcome merely to the parties is not enough." *Wilkerson v. McCarthy*, 336 U. S. 53, 93 L. Ed. 497 (1948); *Carter v. Atlanta and St. Andrews Bay Co.*, 338 U. S. 430, 438, 94 L. Ed. 236 (1949).

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CERTIFICATE OF SERVICE.

The undersigned, Harry M. Wilson, hereby certifies that on the .... day of April, 1952, he mailed a copy of the foregoing brief to the following persons, postage prepaid and properly addressed:

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